

the detention order is confirmed and ratified then the detention of the detenu is legal and no mischief has been done to the section 6 of the Emergency Ordinance 5 of 1969 or Article 151 of the Constitution.

For the courts, just because the Advisory Board through want of time or other eventualities was unable to hold its inquiry or make its recommendations within the prescribed period of three months or just because the manner or form in which other technical requisites were complied with were not in the prescribed forms to hold that the personal liberty of a person lawfully detained has been invaded with such violence as to entitle him to be set free when the detenu by his involvement in international drug trafficking has sentenced to imprisonment for life the minds and bodies of young men and women throughout the world by enslaving them to drugs would be to reduce the courts to forums for theatrical farce and judges to the level of arbiters imperceptive to the urgency for the administration of justice to develop with a changing society."

With all respect, it appears to me that there has been a misreading of the above two cases. In *Karam Singh* (cit) only the present Lord President (then Federal Judge), as one of the five judges, referred to certain Indian cases which stressed the provisions to be followed in preventive detention cases as laying down matters substantially procedural in nature. I should point out that this point was not referred to or considered by any of the other four judges; it was not the *ratio decidendi* of the judgment of Suffian F.J. (as he then was) — far from it. The *ratio decidendi* common to all five judgments was that there were no merits whatsoever in that appeal. Moreover, there are two other points to be noted — first, that Suffian F.J. (as he then was) did not in terms, or on the facts, expressly or impliedly say that, where a time limit was definitely laid down (without any proviso for extension under any circumstances), such time limit can be disregarded for any reason however cogent. Secondly, there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions: see *N.A. Subramania Iyer v. King-Emperor*.⁽¹⁸⁾

The other case of *Ooi Ah Phua* (cit), if I may point out with respect, had nothing whatsoever to do with procedural irregularities being innocuous and of no effect where rules of procedure had been breached or ignored. I regret being unable to see in what way the decision in this case justified the judge in taking the view that violation of section 6 of the Ordinance and Article 151(1)(b) of the Constitution, were within his powers to condone.

The citation of *Karam Singh* and *Ooi Ah Phua* as authorities reminds me of what Greer L.J. said in *Monk v. Warby*: —⁽¹⁹⁾

"...I desire to say first that it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case."

As for the third appeal, Abdul Hamid J. referred to Article 149 which declares that "If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation" to do any of the matters provided in paragraphs (a) to (e) "any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10...."

A I find no such recital in the Ordinance, which permits preventive detention in contravention of Article 5. Apart from this, Abdul Hamid J. erred in saying Article 151 was impugned. Far from it, reliance is placed on it, as well as on section 6.

B In the light of what I have said in regard to the other two appeals, I do not agree that this is a case of mere non-compliance with a statutory direction.

C Learned Federal Counsel submitted that even if this court ruled that there had been breach of a substantive right, this court would still be unable to intervene as the order has subsequently been confirmed by the highest authority in the land having regard to section 6(2) which reads: —

"6. (2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any court."

D Where there has been a misconception as to the power to confirm under section 6(2), it is clearly incumbent on this court to rectify the error. (See *Anisminic v. Foreign Compensation Commission*⁽²⁾ at page 208B, per Lord Wilberforce).

E I have read the judgments of the Lord President and the Chief Justice, Borneo and respectfully agree with them that these three appeals be allowed. I would add that the Chief Justice, Malaya and my brother Ali F.J. concur.

The order of the court, therefore, is that these appeals be allowed and the appellants be set at liberty.

F Appeals allowed.

Solicitors: Kumar, Chan & Chia.

HASHIM BIN SAUD v. YAHAYA BIN HASHIM & ANOR.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.J.J.) May 25, 1977]

[Alor Star — Federal Court Civil Appeal No. 131 of 1975]

G Administrative Law — Right of arrested person to counsel — When right begins — Whether right exists, when accused detained for investigation — Criminal Procedure Code, (F.M.S. Cap. 6), s. 117 — Federal Constitution, art 5(3).

H Constitutional Law — Right to counsel — Person under detention — Federal Constitution, art. 5(3).

I This was an appeal from the decision of Harun J. ([1977] 1 M.L.J. 259). The appellant had been arrested on suspicion of being involved in the theft of an electric generator. After being questioned by the 1st respondent he was produced before a magistrate and subsequently ordered to be detained under section 117 of the Criminal Procedure Code. An application was made for a lawyer to visit the appellant but this was not immediately granted and the lawyer was informed that he could see the appellant on a subsequent date when the investigations were expected to be completed. An application was then made for the release of the appellant it being argued that the refusal to allow the appellant to consult his counsel during the period of police detention was a breach of his constitutional right and rendered the order of the magistrate unlawful. In those circumstances it was argued

that the appellant had right to damages for false imprisonment against the police officer and the Government of Malaysia. The application was dismissed in the High Court where it was held that although the right to consult counsel begins from the moment of arrest, the exercise of that right was postponed for so long as the arrested person was detained under section 117 of the Criminal Procedure Code. The appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) the learned judge was not correct in stating in effect that the right to counsel could only be exercised after the completion of police investigation under section 117 of the Criminal Procedure Code;

(2) in spite of the magistrate's order under section 117 of the Criminal Procedure Code the right of the arrested person to counsel is not lost. The right starts right from the day of arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice;

(3) the onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police;

(4) on the facts of this case the police had given good and sufficient reasons why such right could only be exercised after the period of police investigation was completed.

Cases, referred to:-

- (1) *Miranda v. Arizona* (1966) 86 S. Ct. 1602.
- (2) *Massiah v. United States*, (1964) 377 U.S. 201.
- (3) *R. v. Connor* (1966) 56 D.L.R. (2d) 12.
- (4) *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 M.L.J. 198.
- (5) *Moti Bai v. The State* A.I.R. 1954 Raj. 241.

FEDERAL COURT.

Karpal Singh for the appellant.

Fong Seng Yee (Senior Federal Counsel) for the respondents.

Raja Azlan Shah F.J.: In this appeal which we dismissed the central issue was the time-honoured question of the constitutional right of an arrested person to counsel. When does such right begin?

The learned trial judge had this to say:

"It will be seen that the law regarding the constitutional right to consult counsel must be reconciled with actual practice with regard to police investigations under the Criminal Procedure Code. It seems to me that as the purpose of detention under section 117 C.P.C. is for the purpose of completing investigations and as the constitutional right to consult counsel 'should not be exercised to the detriment of investigation', then for so long as an arrested person is detained under section 117 C.P.C. he cannot exercise his right to consult counsel. I therefore hold that the right to consult counsel begins from the moment of arrest but the exercise of that right is postponed for so long as the arrested person is detained under section 117 C.P.C."

In this case the request to consult counsel was made during the period the plaintiff was under detention under section 117 C.P.C. The plaintiff, therefore, could not exercise his right at the material time and consequently there could not be a denial of such right."

The facts are not in dispute. On August 8, 1972, the plaintiff ("the appellant") and two other persons were arrested on suspicion of being involved in the theft of an electric generator. The legality of the arrest was not challenged. They were interrogated by Inspector Yahaya ("the first respondent") on the same day. As he could not complete his investigations, he brought the plaintiff and the two suspects before a magistrate the following morning and applied for and

A was granted an order of detention under section 117 C.P.C. until August 19, 1972 — a period of ten days. On the same day a person claiming to be from the legal firm of Messrs. Karpal Singh & Company but not a lawyer visited the said inspector at his house with a letter which reads:

"Inspector Yahaya,
Pendang Police Station,
Pendang,
KEDAH.

Dear Sir,

Re: *Hashim bin Saud*

We have been approached by Che Ramli bin Salleh, the father-in-law of the abovenamed to act for the abovenamed. We understand the abovenamed has been detained by you on 8th instant.

C We are instructed to apply to you for an opportunity to see the abovenamed for consultation as soon as possible.

Kindly inform us by return the exact time when our Mr. Karpal Singh could attend at the Police Station, Pendang, or elsewhere to interview the abovenamed.

Needless to say, the abovenamed has a constitutional right to consult a legal practitioner after his arrest.

D We would be grateful if you would grant our request.
Yours faithfully,"

Inspector Yahaya then asked for Mr. Karpal Singh's free dates or the dates on which he could see him. He was not able to give any date. Inspector Yahaya then wrote a note on the said letter.

E "You can see your client on August 19, 1972."

At that time Inspector Yahaya said that August 19 would be the earliest date convenient for appellant to see his counsel as he thought that investigations would have been completed by then. As matters then stood to accede to counsel's request would hamper investigations. If investigations could be completed sooner, he said he would have allowed counsel to see the appellant.

The appellant was however released on August 14, clearly four days before the expiry of the magistrate's order.

G The short issue before us was whether the refusal to allow the appellant to consult his counsel during the period of police detention in spite of the magistrate's order was a breach of his constitutional right and rendered the said order unlawful. In those circumstances it was argued that the appellant had a right of action for damages for false imprisonment against the officer responsible for it and his superiors, that is, the Government of Malaysia, the second respondent.

I think it would be interesting to see how the constitutional right of an arrested person to counsel is implemented in other common law countries.

In the United States an accused person shall have the assistance of counsel and if he asks for counsel police investigation must stop until counsel is available and that he must be informed of his right. A very heavy burden would lie on the prosecution to show that the constitutional right to counsel has been waived if interrogation nevertheless proceeds in the absence of counsel: see *Miranda v. Arizona*.⁽¹⁾ The United States Supreme Court pointed out in *Massiah v. United*

States⁽²⁾ that to hold otherwise would deny the accused an effective representation by counsel at the only stage when legal aid and advice would help him.

In Canada the right of the suspect to counsel conferred by the Canadian Bill of Rights is respected but it is of limited scope. It relates to the trial itself and not to any proceedings prior to it: see *R. v. Connor*.⁽³⁾

English law does not go so far in restricting the right to counsel. There, its importance in the particular context of police interrogation has been given explicit judicial recognition in the Judges' Rules that "any person at any stage of an investigation ... even if he is in custody ... should be able to communicate and to consult privately with a solicitor." This principle is subject to the proviso that no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice. But the Judges' Rules lack all force of law so that it will not be unlawful on the part of the police to ignore them. In those circumstances the only course open to the arrested person is to complain to the police themselves under the Police Act 1964.

As in Canada we have a Bill of Rights. However the position in this country seems to be that the pre-trial right of an arrested person to be allowed to consult a lawyer is merely one particular manifestation of the general right to be allowed to consult and be defended by a legal practitioner of his choice. (Art. 5(3) of the Constitution). Such right starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice: see *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis*.⁽⁴⁾ The position seems to be the same in India: see *Moti Bai v. The State*.⁽⁵⁾ We therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under section 117 C.P.C. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognises only the form of criminal justiciable process and ignores its substance.

The correct view is that as stated by this court in *Ooi Ah Phua's, supra*, case. In spite of the magistrate's order under section 117 C.P.C. the right of the arrested person to counsel is not lost. Such order is essential only on the basis that it renders legal detention which otherwise would have been illegal in view of the provision of clause 4 of Art. 5 of the Constitution which exhorts that an arrested person if not released shall be produced before a magistrate within twenty-four hours and shall not be further detained in custody without the magistrate's authority. The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

On the facts of this case we were satisfied that they had given good and sufficient reason why such

A right could only be exercised after the period of police investigation was completed under section 117 C.P.C. The fact that the appellant was released five days earlier showed the *bona fides* of the police, which means that the right to counsel could be exercised much earlier than that originally allowed.

B We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the State, and not enough is paid to the interests of the State. We have a shocking prevalence of crime, and of crimes of violence, infractions of the plainest requirements of civilised society about which there is no debate. Our capacity to protect life and property itself is in question. There is a manifest failure to secure, through an adequate administration of our criminal laws an appropriate punishment of crimes, the deterrent effects which are in large part the object of these laws. This failure is due in part to the defects in a procedure which favours delay and obstructions to the cause of justice. The chief cause is probably a laxity of public sentiment, the most difficult thing to correct.

Order accordingly.

E Solicitors: Karpal Singh, Wong & Co.

CHEW ONN YUEN & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) October 16, 1975]

F [Seremban — Criminal Appeal No. 3 of 1973]

Copyright — Exposure by way of trade — Sale of pirate gramophone records — Whether infringement of copyright — Charge under s. 15(1)(b) of the Copyright Act, 1969 — Appeal against conviction — Copyright Act, 1969, ss. 4(1) & (2), 5(1), 13 & 15(1)(b) — National Registrations Regulations, 1960, reg. 5.

G The complainants, E.M.I. (Malaysia) Sdn. Bhd., owned copyright in a number of Malay songs which they had bought from the composers after entering into formal agreements with them. They had sent out notices at various intervals to record dealers including the appellants warning them of copyright infringements in respect of their gramophone records but the appellants had shown no intention of paying any heed to these warnings.

H A report was lodged with the police and on November 13, 1971, the complainants' Managing Director, Tanner, accompanied two police officers to the appellant's shop where the police seized 110 records. Earlier on, on the same day, another police officer had bought 3 records from the appellants' shop. These records were found not to be the complainants' records and that they were inferior quality records. This was testified by one Mrs. Beh to whom Tanner had given some of his powers and duties including the power to buy and sell copyright without restriction.

I The appellants were found guilty of two charges under section 15(1)(b) of the Copyright Act 1969. The first charge was that the appellants had by way of trade exposed 105 infringing copies of musical works contained in gramophone records for which copyright then subsisted in favour of E.M.I. (Malaysia) Sdn. Bhd. and the second charge was that the appellants sold three infringing copies of musical works contained in gramophone records for which copyright then subsisted in favour of E.M.I. (Malaysia) Sendirian Berhad.